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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-VS-

PARIS HOYT CARRIGER,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JOSEPH T. MAZIARZ
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

38 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit Court of Appeals en banc held that a state judge's finding regarding the credibility of a witness' repudiated recantation of his trial testimony was not entitled to the 28 U.S.C § 2254(d) presumption of correctness because, after purporting to review the state court record, the court concluded that "each piece of evidence is as consistent" with the witness' recantation as it is with his trial testimony so that the state judge's credibility finding was "not fairly supported by the record as a whole." The en banc court then accepted the repudiated recantation and concluded that Carriger had met the *Schlup v. Delo*, 513 U.S. 298 (1995) "fundamental miscarriage of justice" ("actual innocence") standard to allow the court to review otherwise abusive or procedurally defaulted constitutional claims. The en banc court then considered a constitutional claim unattached to the "actual innocence" showing, concluding that the State of Arizona committed a *Brady* violation by failing to obtain from a government agency, not involved in the investigation or prosecution of the case, a witness' prison file and turn over to the defense information in the file that might have been used to impeach the witness' trial testimony—even though the defense knew of the existence of the file but failed to request or obtain it. This case presents the following questions:

1. Whether the en banc court's methodology in stripping away the 28 U.S.C. § 2254(d) presumption of correctness from the state judge's credibility finding violates the statute, is inconsistent with this Court's caselaw, and will seriously undermine the deference given state court factual findings by federal courts within the Ninth Circuit?

2. Whether the en banc court misconstrued and misapplied this Court's recent decision in *Schlup* by utilizing inherently unreliable evidence to meet the *Schlup* "actual innocence" standard, refusing to consider new reliable evidence that establishes Carriger's guilt, lowering the *Schlup* standard to a "confidence in the verdict" standard, then reviewing the merits of a constitutional claim unattached to the showing of "actual innocence"?

3. Whether the en banc court erred, and created a circuit split, in holding that the prosecution must obtain from a government agency, not involved in the investigation or prosecution of the case, material that might be used to impeach a witness, and turn the material over to the defense, even if the defense has actual knowledge of the existence of the material?

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OPINION BELOW

The en banc opinion of the Ninth Circuit Court of Appeals is not yet published; a copy is included in Appendix A. The order of the district court is not published; it is included in Appendix C.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a writ of certiorari issue to review the en banc decision of the United States Court of Appeals for the Ninth Circuit issued on December 17, 1997. Petitioners have timely filed this petition for writ of certiorari within 90 days of the decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

28 U.S.C. § 2254(d) (pre-1996 amendment):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by State court of competent jurisdiction in proceeding to which the application for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court, on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary in Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of

paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that he factual determination by the State court was erroneous.

28 U.S.C. § 22549(e)(1) (as amended 1996):

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

On March 15, 1978, Paris Hoyt Carriger (hereafter Carriger) was charged with the offenses of robbery and first-degree murder. The facts giving rise to the charges and subsequent convictions are as follows. Around 1970 Carriger met Robert Dunbar while they were incarcerated in Arizona State Prison, and the two became friends. Dunbar was released from prison in 1976. Carriger was released in late 1977.

On March 11, 1978, Carriger called Dunbar and asked if he could stay at Dunbar's home. Carriger told Dunbar that he would sleep outside in his van. Dunbar agreed and Carriger moved in on March 12, 1978.

On the morning of March 13, 1978, Carriger called his employer and told him that he would not be coming to work that day. He spent the rest of the morning and early afternoon with Dunbar. They purchased a gun, then went to Shaw's Jewelry Store, which was about 6 blocks from Dunbar's home. The owner, Robert Shaw, buffed some scratches out of the crystal on Dunbar's watch. After returning home, Dunbar took a nap around 4:00 p.m.. Carriger then left the Dunbar home in his van.

When Mr. Shaw had not arrived home by his normal time, his wife called the store, but received no answer. She later drove to the store, arriving at about 6:40 p.m. The store was in disarray. Mrs. Shaw found her husband's body lying on the floor at the rear of the store. Mr. Shaw had been brutally murdered. His skull had been crushed and his tie was knotted around his neck. A jeweler's ring sizer and a broken cast iron skillet were found near his head. His hands were bound behind his back with adhesive tape.

Carriger awoke Dunbar from his nap around 6:00 p.m. He and Dunbar went outside to Carriger's van. Carriger said that he had robbed the jewelry store, and showed Dunbar jewelry, watches, and rings. Dunbar helped remove the price tags from the jewelry. Carriger gave Dunbar some of the loot. He put the rest in an attache case, and he and Dunbar took that case and a gun case to the apartment of Dunbar's stepdaughter. Carriger handed the cases to Dunbar's stepdaughter

Dunbar then drove Carriger to various locations where he disposed of his clothes and other items. Carriger cut his name out of the pocket of the pants he had been wearing and threw them in the canal. Carriger told Dunbar he had pulled a gun on Mr. Shaw, tied him up, and then repeatedly beat him with a skillet and a "flat iron." When Mr. Shaw's heart would not stop beating, Carriger used the victim's tie to strangle him.

The following morning, Dunbar called the police. Officer Dan Barker received the call from Dunbar, who identified himself as "Bob," and asked

if the police would be interested in clearing up the jewelry store murder. Dunbar told Barker that he was an ex-con, that he had supplied the killer with a gun, and that he wanted immunity for a burglary he (and Carriger) had committed a few days earlier. Barker eventually set up a meeting between Dunbar and a detective.

Dunbar met with officers shortly after the phone call. He told them about Carriger's confession to the murder and helped arrange Carriger's arrest. Dunbar retraced the route he had taken the night before and helped the police recover Carriger's discarded clothing, as well as credit cards and personal papers that belonged to the victim. He also took the police to his stepdaughter's apartment, where she turned over the attache case and the gun case. The police seized Carriger's luggage, and retrieved Carriger's pants from the canal. All of the clothing recovered fit Carriger. The shoes had blood on them. Pairs of pants found in Carriger's luggage had Carriger's name on the inside of the pockets. The pants retrieved form the canal were the same brand and size as the pairs found in Carriger's luggage and the pocket was cut where Carriger's name would have been.

Carriger had shaved his head just before his arrest. He had two keys in his possession when arrested. One unlocked the Dunbar residence and the other unlocked the attache case that contained the stolen jewelry.

An officer present at the autopsy cut the wad of tape from Mr. Shaw's hands and, using forceps, placed it in a container. An identification technician dusted the outside of the tape wad with fingerprint powder and found one latent print. He removed the piece of tape bearing the print and put it on a lift card. The latent print was matched to Carriger's right thumb. Carriger's prints were also found on the gun case, and on a gun slick and a piece of paper inside the case.

Following a jury trial, Carriger was convicted of robbery and first-degree murder. The trial court (Honorable Dorothy Carson) held an aggravation-mitigation hearing, found two aggravating circumstances (Carriger's prior conviction for a crime of violence and the especially heinous, cruel or depraved nature of the murder), and no mitigating circumstances sufficiently substantial to call for leniency. It then sentenced Carriger to prison for not less than 99 years nor more than 100 years for the robbery and imposed a death sentence for the murder. The Arizona Supreme Court affirmed Carriger's convictions and sentences on direct appeal. *State v. Carriger (Carriger I)*, 599 P.2d 788 (1979)

On September 29, 1981, Carriger filed a petition for post-conviction relief in the trial court, raising several claims, including the claim that trial counsel were ineffective in failing to obtain Robert Dunbar's Arizona Department of Corrections (DOC) file to obtain impeachment material. The

trial court summarily dismissed the petition and denied a motion for rehearing. Carriger petitioned the Arizona Supreme Court for review. The Arizona Supreme Court held that Carriger had been denied effective assistance of counsel at sentencing. It remanded the matter to the trial court for resentencing and for consideration of any issues properly raised in the petition. *State v. Carriger (Carriger II)*, 645 P.2d 816 (1982).

The trial court gave Carriger the opportunity to present evidence to support his claims and conducted a resentencing. At the conclusion of the hearing, the trial court denied relief on the remaining claims. It again sentenced Carriger to death for the murder and to a prison term of not less than 99 years nor more than 100 years for the robbery. The Arizona Supreme Court affirmed Carriger's sentences as well as the denial of post-conviction relief. *State v. Carriger (Carriger III)*, 692 P.2d 991 (1984)

On July 5, 1985, Carriger filed a petition for writ of habeas corpus in federal district court. On July 5, 1986, the district court denied the petition. Carriger's appeal to the Ninth Circuit was stayed.

On September 25, 1986, Carriger filed his second petition for post-conviction relief in state court. Because Judge Carson had retired, the matter was assigned to the Honorable Michael Ryan. During the course of a 6-day evidentiary hearing, Joyce Dunbar (Stevens), who had since divorced Robert Dunbar, recanted her trial testimony and testified that Dunbar told her that he and Carriger robbed the jewelry store and killed Robert Shaw. Initially, Dunbar testified that his trial testimony was truthful. Dunbar later recanted, testifying that he and Joyce had robbed the jewelry store and killed Robert Shaw. However, Dunbar's recantation was short-lived, for he then testified that he had lied to get even with Joyce and to embarrass the Arizona Attorney General's Office, the Maricopa County Attorney's Office, and the Phoenix Police Department because none of these entities would help him out in prison. Several other witnesses testified, but their testimony was cumulative to testimony or evidence presented at trial or during the first post-conviction relief proceeding.

After hearing all of the testimony and considering all of the evidence presented, Judge Ryan denied the petition for post-conviction relief. (Appendix D) After rejecting the veracity of Joyce Stevens' testimony, Judge Ryan found that, even if her testimony, and the testimony of the other witnesses, was "believed in its entirety," it would merely indicate that Dunbar may have participated in the robbery and murder but would "not exonerate or mitigate [Carriger's] role in the murder." (*Id.* at 2, 6) Judge Ryan also stated that he disbelieved the short-lived recantation testimony of Robert Dunbar, finding it "clearly incredible." (*Id.* at 3) He found that "the evidence plainly establishes [Carriger's] guilt." (*Id.*) Judge

Ryan denied Carriger's motion for rehearing (Appendix E) and the Arizona Supreme Court denied his petition for review.

On November 4, 1991, a three-judge panel of the Ninth Circuit Court of Appeals issued an opinion affirming the district court's denial of habeas corpus relief. *Carriger v. Lewis (Carriger IV)*, 948 F.2d 588 (9th Cir. 1991) The Ninth Circuit subsequently granted rehearing en banc. On July 28, 1992, an 11-judge en banc panel of the court, with three judges dissenting, again affirmed the district court's denial of habeas corpus relief. *Carriger v. Lewis (Carriger V)*, 971 F.2d 329 (9th Cir. 1992)

On February 4, 1994, Carriger filed a third petition for post-conviction relief and subsequently obtained a stay of execution. On May 4, 1994, Judge Ryan issued a detailed order dismissing the petition on the grounds that the claims raised were not cognizable under state law in a successive petition for post-conviction relief and/or were precluded under state law, and that the claims did not fall within any of the exceptions (including newly discovered evidence) to non-cognizability or preclusion. (Appendix F) The trial court denied Carriger's motion for rehearing. (Appendix G) The Arizona Supreme Court denied his petition for review.

On August 8, 1995, Carriger filed a successive petition for writ of habeas corpus in federal district court. On November 2, 1995, the district court issued a memorandum of decision and order, denying the petition, as well as several ancillary motions Carriger had filed with the district court. (Appendix C) The district court held that: (1) Carriger's "actual innocence" claim failed to meet the *Carrier/Schlup* "gateway" standard; (2) Carriger's claim that the state courts on collateral review failed to recognize "new" evidence allegedly implicating Dunbar related to a state law question and the state court *did* reconsider Carriger's death sentence in light of the alleged "new" evidence; (3) Carriger's *Brady* claims constituted an abuse of the writ and, alternatively, were meritless; (4) Carriger's competency claims were abusive, procedurally defaulted, and alternatively, meritless; and (5) Carriger's ineffective assistance of counsel at resentencing claim was abusive, procedurally defaulted, personally waived, and alternatively, meritless to the extent it alleged ineffectiveness related to the competency issue. (*Id.*)

Carriger appealed and the district court issued a certificate of probable cause. The Arizona Supreme Court scheduled Carriger's execution for December 6, 1995.

On November 29, 1995, the original three-judge panel of the Ninth Circuit issued a per curiam order denying the motion for stay of execution and affirming the district court's denial of the successive petition for writ of habeas corpus for substantially the reasons stated in the district court's

memorandum of decision and order, which it attached to its order. On December 2, 1995, the panel issued an amended order sua sponte granting a stay of execution and ordering supplemental briefing on the applicability of this Court's just issued opinion in *Thompson v. Keohane*, 516 U.S. 99 (1995) to the state court's determination that Carriger failed to establish actual innocence as defined by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995). On September 10, 1996, the three-judge panel issued an opinion affirming the district court's denial of the petition for writ of habeas corpus. *Carriger v. Stewart (Carriger VI)*, 95 F.3d 755 (9th Cir. 1995) The Ninth Circuit granted rehearing en banc.

On December 17, 1997, the sharply divided en banc court issued its opinion. The six judge majority refused to defer to the Arizona trial judge's finding that Robert Dunbar was not credible when he recanted his trial testimony and claimed that he and his ex-wife had robbed and murdered the victim. (Appendix A at 24–30) The majority concluded that "each piece of evidence is as consistent with Dunbar's confession[1] as it is with his trial testimony" (*id.* at 26) and, therefore, in its view, "the state court's credibility determination is not fairly supported by the record as a whole." (Id. at 30) The majority accepted Dunbar's recantation, and considered it in conducting its review of the district court's rejection of Carriger's *Herrera* (*Herrera v. Collins*, 506 U.S. 390 (1993)) and *Schlup* claims. (*Id.* at 31–37)

The majority concluded that Carriger failed to establish a *Herrera* "freestanding claim of innocence" because Dunbar's short-lived recantation failed to establish "that Carriger more likely than not is innocent." (Appendix A at 31–34) The majority then held that Dunbar's recantation was sufficient to meet the *Schlup* "miscarriage of justice" standard, because, in the majority's view, although Carriger failed to "affirmatively prove his actual innocence," he had "more than shown sufficient doubt about the validity of his conviction to satisfy *Schlup* and permit consideration of his constitutional claims." (*Id.* at 34, 36) Having passed through the *Schlup* "gateway" to otherwise abusive and procedurally barred claims, the majority held that the State of Arizona had committed a *Brady* violation by failing to obtain, review, and hand over to the defense, Robert Dunbar's DOC file. (*Id.* at 37–45) The majority vacated the panel opinion, reversed the district court's judgment, and ordered the matter remanded to the district court with instructions to grant the writ. (*Id.* at 45)

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1. Throughout its opinion, the majority refers to Dunbar's short-lived recantation as a "confession."

Judge Kozinski, writing for the five dissenting judges, took issue with "the majority's hopelessly one-sided review of the record" and its refusal to defer to the state court judge's factual determination that Robert Dunbar's short-lived recantation was "not credible," stating that "[t]he majority's methodology will seriously undermine the degree of deference federal courts in this circuit give to state court findings of fact in habeas proceedings." (Appendix B at 14–16)

The dissent also criticized the majority for holding that "[a] repudiated recantation" is the type of "reliable new evidence" sufficient to unlock the *Schlup* gateway (*id.* at 2) and that, if the majority decision were allowed to stand, the abuse of the writ doctrine "will be severely undermined," and "the *Schlup* gateway becomes a freeway off death row." (*Id.* at 6) The dissent called the majority to task for finding "unreliable" and giving "little weight" to new reliable evidence that "destroys Carriger's theory and provides strong proof that he was present and participated in the murder." (*Id.* at 18) And, the dissent pointed out that the majority "cuts the heart out of *Schlup*" by watering down the "actual innocence" standard articulated by this Court in *Schlup*, to a standard more akin to the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice standard (confidence in the verdict undermined). (*Id.* at 8)

Finally, the dissent pointed out that the majority's finding of a *Brady* violation was flawed because the defense knew of the existence of Dunbar's DOC file and "[t]he government need not give notice sua sponte where the accused has knowledge of the documents in question." (*Id.* at 22–23)

REASONS FOR GRANTING THE WRIT

I

THE EN BANC COURT'S REFUSAL TO DEFER TO THE STATE COURT JUDGE'S DETERMINATION OF WITNESS CREDIBILITY DIRECTLY CONFLICTS WITH WELL-ESTABLISHED PRECEDENT OF THIS COURT AND WILL SERIOUSLY UNDERMINE THE DEFERENCE GIVEN STATE COURT FACTUAL FINDINGS BY FEDERAL COURTS WITHIN THE NINTH CIRCUIT.

Perhaps the most disturbing aspect of the en banc majority's decision is the disparaging manner in which it treated the state trial judge's (Judge Ryan's) finding on the issue of credibility. After conducting a "hopelessly one-sided review of the record" (Appendix B at 17) and stating that "each piece of evidence is as consistent with Dunbar's confession as it is with his trial testimony" (Appendix A at 26), the majority dismissed Judge Ryan's

credibility determination as "not fairly supported by the record as a whole" and "not entitled to a presumption of correctness." (*Id.* at 30) The majority's methodology is a blueprint for federal judges, who are so inclined, to dispose with the 28 U.S.C. § 2254(d)[2] presumption of correctness in virtually any habeas case. If allowed to stand, it will wreak havoc throughout federal courts within the wide ambit of the Ninth Circuit.

Pursuant to 28 U.S.C. § 2254(d)(8) a state court's factual findings are "presumed to be correct" if "fairly supported by the record." This Court has held—time and again—that a state court's factual findings are entitled to a "high measure of deference." *E.g. Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 455 U.S. 591, 598 (1982) And, a determination of witness credibility is entitled "special deference." *Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *see also Wainwright v. Witt*, 469 U.S. 412, 428–29 (1985); *Maggio v. Fulford*, 462 U.S. 111, 113 (1983) State court findings of fact are entitled to *at least* as much deference on federal habeas corpus review as are district court factual findings, and probably more. *Witt*, 469 U.S. at 428; *Yount*, 467 U.S. at 1038; *see also Hernandez v. New York*, 500 U.S. 352, 369 (1991) ("It 'would pervert the concept of federalism to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings.'") In determining whether a state court's factual finding is "fairly supported by the record," a federal court *must defer* to the state court on all inferences fairly deduced from the record. *Parke v. Raley*, 506 U.S. 20, 35–36 (1992); *Lonberger*, 459 U.S. at 435. Further, "Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Lonberger*, 459 U S. at 434. As this Court aptly noted, "we greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Id.* at 434–35; *See also Battle v. Delo*, 64 F.3d 347, 352–53 (8th Cir. 1995) (state judge's finding at post-conviction relief hearing that the testimony of another person who claimed

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2. Because Carriger filed his successive habeas petition before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the court applied the statute as it existed prior to amendment. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997). However, the majority's methodology and refusal to defer to the state court credibility finding applies with equal force to the post-AEDPA amended statute, 28 U.S.C. § 2254(e)(1).

to be the "real killer" was "incredible" binds federal courts pursuant to 28 U.S.C. § 2254(d) and the testimony is entitled to "no weight" in conducting a *Schlup* analysis)

In 1988, after presiding over a 6-day post-conviction relief evidentiary hearing, Judge Ryan made the following written factual findings regarding Robert Dunbar's testimony during the course of that proceeding:

> Robert Dunbar testified for the State in 1978. *At these hearings he testified on August 28, 1987, that he would testify as he did in 1978.* He denied Ms. Stevens' allegations. However, *on October 30, 1987, Dunbar without any grant of immunity and in the presence of his appointed counsel, testified that his 1978 testimony was false and that he and Joyce Stevens committed the robbery and murdered Mr. Shaw.*
>
> The testimony of Dunbar at the hearing on October 30, 1987, *was inconsistent with the physical evidence, testimony of other trial witnesses*, and his prior testimony. *On December 11, 1987, Dunbar, after receiving testimonial immunity, testified that the testimony he gave on October 30, 1987, was false.* He said he gave that testimony to get even with his ex-wife for her false testimony, and to embarrass the prosecution and police. Additionally, he said he wanted to try and make money by selling his story. *His desire to make money was confirmed by his attorney and Petitioner's attorney*. However, he did not stick to this story for long. As early as November 17, 1987, he wrote to the Court admitting testimony was false. He confirmed that on December 11, 1987.
>
> Dunbar's 1978 trial testimony is supported by the physical evidence and the testimony of other witnesses such as Jackie McCullar and Dennis Stevens. Crucial physical evidence linking Petitioner to the homicide includes his fingerprints on the tape binding the victim's hands, the attache case key found in Petitioner's property, the discarded clothes with the inside pockets removed where Carriger customarily placed his initials, Carriger's prints on the gun case, and the boots worn during the robbery which a number of witnesses in previous proceedings testified belonged to Petitioner. *The evidence plainly establishes Petitioner's guilt.*
>
> The theory of Petitioner that Dunbar planted most of the physical evidence as part of an elaborate scheme to frame Carriger is without merit. *It is obvious from these proceedings*

that Dunbar is not capable of either perpetrating or perpetuating such a scheme. He could not even stick to his claim that his trial testimony was false for more that a couple of weeks. What happened here confirms what the Supreme Court said in 1984: "[n]othing presented to this Court indicates Dunbar has the ability to conceive such a story and maintain it under questioning." 143 Ariz. at 151.

. . .

Dunbar's recantation of his trial testimony would probably not change the verdict. *The recanting testimony was in direct conflict with the physical evidence, the manner in which Shaw was murdered, and other testimony. Also, Dunbar later admitted that the recantation was a lie and he had done it for money and spite. The best that can be said is that Petitioner has shown this Court that Dunbar is a liar, albeit a poor* one. However, the Jury in 1978 knew Dunbar was a felon six times over who had spent time in prison, who was a liar, a thief, a burglar, and a witness who demanded a deal and immunity before he testified.

The evidence presented here is another attack on the credibility of Dunbar's trial testimony. This was addressed at the 1982 hearing for Post-Conviction Relief with evidence that was in existence at the time of the trial. The evidence here in large part consists of statements and acts occurring years after the trial.

Dunbar's testimony at the trial in 1978 was corroborated by physical evidence and testimony from other sources. *Nothing here refutes that to the point it would affect the verdict.*

. . .

The evidence shows the murder was committed by Carriger; Dunbar's recantation is simply unbelievable. The testimony of the other witnesses even if believed in its entirety indicates Dunbar was there and may have participated in the robbery and homicide. However, it does not exonerate or mitigate Petitioner's role in the murder of Mr. Shaw.
(Appendix D at 2, 5, 6, emphasis added).

The majority began its attack of Judge Ryan's credibility determination by stating that he "had not been the trial judge" (Appendix A at 25), as if this somehow entitled his finding to less deference. What the majority conveniently ignored, however, is that Judge Ryan *saw and heard* Dunbar testify on August 28, 1987, that his trial testimony had been truthful, *saw and heard* Dunbar testify on October 30, 1987, that his trial testimony was not truthful and that he and his ex-wife had committed the

murder, then *saw and heard* Dunbar testify on December 11, 1987, that his recantation ("confession") was false and that his trial testimony had been truthful. (Appendix D at 2-3) As this Court has stated on a couple of occasions:

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . .To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.

Witt, 469 U.S. at 434, quoting *Boyd v. Boyd*, 169 N.E. 632, 634 (N.Y. 1930); *Lonberger*, 459 U.S. at 434, quoting *Boyd*.

Next, the majority seizes upon Judge Ryan's statement that Dunbar's trial testimony was more consistent with the physical evidence than was his short-lived recantation, erroneously stating that Judge Ryan's evaluation of Dunbar's credibility was solely "based on [Judge Ryan's] conclusions that the physical evidence at trial was consistent with Dunbar's trial testimony and inconsistent with his confession, and that Dunbar had motivations to lie in 1987." (Appenix A at 25-26)[3] While Judge Ryan certainly based his credibility determination, in part, on these two factors, he *also* based it upon the "testimony of other witnesses," Dunbar's inability to maintain a lie for very long—let alone perpetrate and perpetuate the type of frame-up alleged by Carriger, the fact that Dunbar's recantation included the assertion that he *and his ex-wife* committed the murder, and, most importantly, his personal observations of Dunbar when he testified before him and gave the conflicting testimony. (Appendix D at 2-3, 5) The majority simply ignored these additional factors.

The majority then proceeded to review the physical evidence through a Carriger-colored prism, attempting to compartmentalize and explain away each individual piece of evidence by drawing inferences (some far-fetched)

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3. It is particularly troubling that the majority attempts to strip away the presumption of correctness by nit-picking at Judge Ryan's detailed written order. The 28 U.S.C. § 2254(d) presumption of correctness does *not* require any sort of written findings by the state court. *Witt*, 469 U.S. at 430. Had Judge Ryan simply said, "I did not believe Dunbar when he recanted his trial testimony," presumably the majority would have no ammunition to attempt to shoot down the presumption of correctness. It defies logic to allow the presumption of correctness to be stripped away because the trial judge took the time and effort to more fully explain the basis of his finding.

most favorable to Carriger. (Appendix A at 26–30) As noted by the dissent:

> The majority draws each inference in favor of Carriger. It begins by discarding the physical evidence, finding that: Carriger could not have left only one fingerprint on the tape while binding Shaw's hands, maj. op. at 14638; Carriger's having the key to the attache case meant nothing, Id. at 14639; Dunbar wore Carriger's clothes during the robbery, *Id.* at 14639; Dunbar planted Carriger's jeans in the canal, *Id.* at 14640; Carriger's fingerprints on the gun case meant nothing. *Id.* at 14640; Dunbar wore Carriger's boots. *Id.* at 14640; and Carriger would have left recoverable fingerprints on the jewelry had he not worn gloves. *Id.* at 14640. The majority then moves on to even more speculative matters, finding that: Dunbar could not have known the details of the crime unless he participated. *Id.* at 14641; Dunbar was not shown diagrams of the store; *Id.* at 14641; Dunbar's lawyer was not interested in publicity. *Id.* at 14641; Dunbar was vague and evasive when recanting his confession. *Id.* in 14641–42. None of these findings had been made before in the twenty-year history of this case. and each is used to support the majority's most speculative (and contradictory) findings of all: that Dunbar was telling the truth when he confessed. *Id.* at 14642, and that he acted alone. *id.* at 14634 n.1. *The role of the factfinders in our criminal and habeas systems demands more respect than this.*

(Appendix B at 16 n.13, emphasis added).

In addition to viewing the record, and drawing all inferences, in the light most favorable to Carriger, the majority failed to even recognize that portion of Dunbar's recantation that puts the lie to it—Dunbar's claim that he and his ex-wife (not Carriger) committed the robbery and murder.

> Dunbar's confession helps Carriger only if we think that all twelve imaginary jurors would swallow the preposterous tale that Dunbar and Joyce robbed and killed Robert Shaw together. Yet the record lacks even a sliver of support for this fantasy: There is no physical evidence of her involvement and she has an alibi. *Absolutely no one—Carriger himself included—takes this part of Dunbar's confession seriously.*
>
> Joyce's participation is not a side show—a trivial detail that can be shrugged off. So far as Carriger is concerned, this is the meat of the coconut. Let's say Dunbar was there, that he

> participated in the robbery, that he wielded the lethal frying pan. *See* maj. op. at 14641. None of this proves Carriger *wasn't* there. The only part of Dunbar's confession that exonerates Carriger is where he claims it was Joyce (not Carriger) who was his accomplice. And for that part we have only Dunbar's unadorned words—the fabrication of a proven liar.

(*Id.* at 10–11, emphasis original in part, added in part) Thus, not only did the majority draw every conceivable inference (and some inconceivable ones) in favor of Carriger, it picked from Dunbar's "confession" only those portions that supported its desired result.

The majority's one-sided review of the state court record, and its insistence upon drawing every inference adverse to Judge Ryan's credibility determination, leaves the 28 U.S.C. §2254(d) presumption of correctness "in tatters." (Appendix B at 22) It also conflicts with this Court's well-established caselaw. *E.g. Raley*, 506 U.S. at 35–36 (federal court must defer to state court on all inferences reasonably drawn from the record); *Lonberger*, 459 U.S. at 432–35 (before rejecting a state court's factual determination, a federal court "must conclude that the state court's findings lacked even 'fair support' in the record," including "inferences fairly deducible" from the record).

However, even accepting the majority's one-sided view of the state court record, it still erred in stripping away the presumption of correctness from Judge Ryan's credibility determination. The majority concluded that "each piece of evidence is *as consistent*" with Dunbar's confession as it is with his trial testimony." (Appendix A at 26, emphasis added) Accepting the majority's findings, Judge Ryan's credibility determination has to be, as a matter of law, "fairly supported by the record." *Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (when two contrary conclusions "find fair support in the record" a federal court must defer to the state court's finding pursuant to 28 U.S.C. §2254(d)(8)); *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996) (citing *Goode* and holding that where state court findings "have support in the record" a federal court must defer, even though it "might have rendered contrary findings that also would have support in the record") In finding that a *federal* circuit court of appeals had erred in overturning a *federal* district court's factual finding, this Court stated:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence

> differently. *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous*.
>
> This is so *even when the district court's findings do not rest on credibility determinations*, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985) (emphasis added, citation omitted) The factual finding here is purely a question of credibility. Thus, Judge Ryan's credibility determination is most certainly "fairly supported by the record" and the majority erred in stripping away the 28 U.S.C. §2254(d) presumption of correctness.

The majority's methodology in stripping away the 28 U.S.C. § 2254(d) presumption of correctness is so out of line with this Court's well-established caselaw that one would think that other federal courts would simply shun it. Unfortunately, it is an en banc decision, which binds all federal courts within the ambit of the Ninth Circuit. Therefore, as pointed out by the dissent, it "will seriously undermine the degree of deference federal courts in this circuit give to state court findings of fact in habeas proceedings." (Appendix B at 14–15) This Court must grant certiorari to bring the Ninth Circuit back in line with the rest of the federal judiciary on this important issue.

II.

THE EN BANC COURT UTILIZED INHERENTLY UNRELIABLE EVIDENCE TO UNLOCK THE *SCHLUP* "GATEWAY," REFUSED TO CONSIDER RELIABLE NEW EVIDENCE THAT ESTABLISHES CARRIGER'S GUILT, AND LOWERED THE *SCHLUP* ACTUAL INNOCENCE STANDARD AND APPLIED IT IN A MANNER THAT WILL TURN THE *SCHLUP* "GATEWAY" INTO A FLOODGATE.

After accepting and giving weight to Dunbar's short-lived recantation,[4] the majority found that Carriger failed to establish a *Herrera* claim (Appendix A at 31–34), but did meet the *Schlup* "gateway" actual innocence standard. (*Id.* at 34–37) The majority erred in four crucial respects: (1) it utilized inherently unreliable recantation testimony (which itself was subsequently recanted) to unlock the *Schlup* gateway; (2) it failed to consider new reliable evidence that establishes Carriger's guilt beyond

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4. If the majority had deferred to the state court judge's finding on the credibility of Dunbar's recantation, the *Schlup* gateway would necessarily be slammed shut because the remaining "new evidence" offered by Carriger does not come close to meeting even the majority's watered-down *Schlup* standard. (See Appendix A at 34–36; Appendix C at 8–15.)

any doubt; (3) it effectively lowered the *Schlup* actual innocence standard to a "confidence in the verdict" standard; and (4) it then went on to review a federal claim unattached to the purported "actual innocence" claim. If allowed to stand, the en banc decision will wreak havoc, not only in federal courts within the Ninth Circuit, but in federal courts across the nation. Moreover, this Court should seize the opportunity to clarify *Schlup* and provide guidance to federal courts nationwide faced with ever increasing *Schlup* claims.

In *Schlup* this Court held that the *Murray v. Carrier*, 477 U.S. 478 (1986) "fundamental miscarriage of justice" standard applied to allow federal district courts to review an otherwise abusive or procedurally barred federal constitutional claim where the "constitutional error has caused the conviction of an innocent person." 513 U.S. at 324. The Court held that only "new reliable evidence" would suffice to meet this standard. *Id.* The Court stated that to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" the habeas petitioner "must show that it is more likely than not that *no* reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327, quoting *Carrier*, 477 U.S. at 496 (emphasis added) The Court stressed that the *Carrier* standard" is intended to focus the inquiry on actual innocence," and that district courts were to "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327-28. The Court further noted that "a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to convict him beyond a reasonable doubt." *Id.* at 329. The Court did *not* address the issue of whether a federal district court was *required* to reach the merits of the alleged constitutional error if it found that the petitioner had satisfied the *Carrier* actual innocence standard. *Id.* at 333 (O'Connor, J., concurring) ("the Court does not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy").

A. A REPUDIATED RECANTATION IS NOT "NEW RELIABLE EVIDENCE."

The majority fails to acknowledge the essential element of a *Schlup* "actual innocence" claim—that the new evidence must be reliable. This Court was very clear that *reliability* was the essential elem*enthlup* claim:

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new *reliable* evidence—whether it be *exculpatory scientific evidence, trustworthy*

eyewitness accounts, or critical *physical evidence*—that was not presented at trial.

513 U.S. at 324 (emphasis added) The Court noted that societal interests in finality, comity, and the conservation of scarce judicial resources demanded that only "new reliable evidence" was sufficient to unlock the *Schlup* gateway "[b]ecause such evidence is obviously unavailable in the vast majority of cases" and, therefore, "claims of actual innocence are rarely successful." *Id.*

Dunbar's repudiated recantation is certainly not "scientific evidence" or "critical physical evidence"; nor is it a "trustworthy eyewitness account[ ]." *Schlup*, 513 U.S. at 324 (emphasis added) There is no evidence as *unreliable* as recantation testimony, let alone short-lived repudiated recantation testimony. *See State v. Krum*, 903 P.2d 596, 602 (Ariz. 1995) ("There is no form of proof so unreliable as recanting testimony.") The federal circuits have uniformly acknowledged the inherent unreliability of recanted testimony. *United States v. Gresham*, 118 F.3d 258, 267 (5th Cir. 1997) ("recanting affidavits and witnesses are viewed with extreme suspicion by the Courts"); *Olson v. United States*, 989 F.2d 229, 231 (7th Cir. 1993) ("It is a truism that our courts treat recantations with skepticism"); *Kandiel v. United States*, 964 F.2d 794, 797 (8th Cir. 1992) (recanted testimony viewed with "considerable skepticism"); *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991) "Recanting affidavit and witnesses are viewed with extreme suspicion"); *Sanders v. Sullivan*, 863 F.2d 218, 225 (2nd Cir. 1988) (recantation of trial testimony is "looked upon with the utmost suspicion"); *United States v. Santiago*, 837 F.2d 1545, 1550 (11th Cir. 1988) ("recantations are viewed with extreme suspicion by the courts"); *United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980) ("Recantation of testimony given at trial is not looked upon with favor," but "with downright suspicion"); *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (recantation of trial testimony is "looked upon with the utmost suspicion").

Thus, the Ninth Circuit stands as a minority of one among the federal circuits in holding that recantation testimony is reliable enough to unlock the *Schlup* gateway. But it is even worse; here we have a *repudiated* recantation. A repudiated recantation is not even substantive evidence, and can be used *only* to cross-examine the witness.[5] *United States v. Glantz*, 884 F.2d 1483, 1486 (lst Cir. 1989); *Lindsey v. United States*, 368 F.2d

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5. Because Dunbar is dead, it cannot even be used for this purpose.

633, 636 (9th Cir. 1966); *see also* Moore's Federal Practice § 633.05[2] (3d ed. 1997) As the dissent aptly noted:

> Recanting testimony is easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial. A *repudiated* recantation like Dunbar's is even less worthy, of serious consideration.

(Appendix B at 4, emphasis in original).

The majority clearly erred in not requiring Carriger to present "new reliable evidence" before it unlocked the *Schlup* gateway. If the decision is allowed to stand, the abuse of the writ doctrine will be effectively eviscerated —at least in the Ninth Circuit. "Reliability" must be the key that unlocks the *Schlup* gateway.

B. NEW RELIABLE EVIDENCE ESTABLISHES CARRIGER'S GUILT.

In addition to disregarding the reliability requirements in allowing Dunbar's repudiated recantation to unlock the *Schlup* gateway, the majority also summarily dismissed—and did not even discuss in its *Schlup* analysis—new reliable evidence that establishes Carriger's guilt. This clearly violated the mandate of *Schlup*.

In *Schlup* this Court stated that the *Carrier* standard it adopted "is intended to focus the inquiry on actual innocence." 513 U.S. at 327. And that "the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327–28. It explained that:

> The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

Id. at 328, quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970) Thus, this Court mandated that a habeas court considering a state prisoner's assertion that he met the "actual innocence" gateway standard *also* consider new evidence substantiating guilt.

During the second post-conviction relief proceedings in 1987, a criminalist disassembled the wad of tape that had been wrapped around the victim's hands into 12 segments, then reconstructed the tape. (Appendix H at 28–30) The criminalist then measured the entire length of tape, finding

it to be approximately 8 feet 9 inches in length. (*Id.* at 30) He then measured *from the end of the roll of tape* to where Carriger's print had been lifted, and found the distance to be approximately 21½ inches. (*Id.*).

The criminalist was requested to attempt to ascertain the precise location of Carriger's print on the wad of tape in response to Carriger's assertion that he intended to challenge identification of the latent print. (Appendix H at 2–3) The State *also* presented the testimony of two additional fingerprint experts to corroborate the fact that the print on the wad of tape was definitely left by Carriger. (*Id.* at 4–22) Faced with this extremely probative evidence, Carriger's counsel withdrew their challenge to the identification of the print, and objected to the State presenting the aforementioned evidence. (*Id.* at 3) In light of Carriger's abandonment of his challenge to the print identification, Judge Ryan concluded that the evidence was no longer relevant to the claims Carriger was then pursuing, but allowed the testimony to be presented as an offer of proof. (*Id.*) Carriger's attorneys had received the criminalist's report a week before he testified, interviewed him before he testified, and cross-examined him at the hearing. (*Id.* at 3, 31–35).

Carriger's "theory" on why his fingerprint was on the wad of tape wrapped around the victim's hands was that it was on the exterior of the roll of tape when Dunbar allegedly "took" the tape from his van:

> The victim in this case had his hands bound with tape. On the tape was a fingerprint belonging to Carriger. Carriger alleges as another aspect of incompetence that Gay did not effectively argue this fact away. Carriger now claims Dunbar took the tape from Carriger's van and the print was already on the tape when Dunbar took the tape. This can only be characterized as a weak assertion and, at best, is not very credible.

Carriger III, 692 P.2d at 1004. The fact that Carriger's print could *not* have been on the outside of the roll establishes his guilt beyond *any* doubt. In denying the motion for rehearing in the third postconviction relief proceeding, Judge Ryan stated:

> [I]t was established that the print was nearly two feet from the end of the tape. *The impact of this evidence at any subsequent trial would be enormous*.
>
> Petitioner throughout these proceedings argued that Dunbar "framed" Petitioner. To support this argument, Petitioner claimed that all the physical evidence was tampered with or planted by Dunbar. A key argument was that Petitioner's print was on the end of the tape and therefore was either there

> accidently or planted by Dunbar. The subsequent examination of William Morris establishes that the print is 21½ inches from the end of the tape. *This evidence literally destroys Petitioner's argument* that Dunbar somehow was able to manipulate all the physical evidence . . . Where the print was found would be crucial at any subsequent trial. And *its placement nearly two feet from the end of the tape is devastating to the petitioner.*

(Appendix G at 2, emphasis added) The district court also found this new evidence to be reliable and probative. (Appendix C at 9 and n.4).

The en banc majority did not even discuss this new reliable evidence in conducting its *Schlup* "analysis." (Appendix A at 34–37) In purporting to conduct a "[c]lose examination" of the physical evidence to shoot down Judge Ryan's credibility finding, it attempted to explain it away as follows:

> *The fingerprint on the tape*. Dunbar explained [in his repudiated recantation] that he had taken the adhesive tape, used to bind Shaw's hands, from Carriger's van. The tape belonged to Carriger, and this would explain Carriger's fingerprint on the tape. Had Carriger left the print while binding the victim, as the state contends, *it is difficult to understand how he could have left only one print*. The State points to an offer of proof made at the 1987 hearing, in which a criminalist testified that he had reconstructed the tape and determined that Carriger's fingerprint was located 21 inches from an end of the tape. This testimony suggests that the print was left during the binding of Shaw's hands.
>
> *Cross examination was able to bring out an internal inconsistency in the expert's testimony*: The expert stated he could piece together all of the segments of tape cut from the victim's wrists by matching the irregularity of the edges, but admitted *he could not match either end of the reconstructed tape to the end of the roll*. The state court did not admit the criminalist's testimony into evidence, and made no findings as to its relationship. The defense never had an opportunity to examine the tape, in either reconstructed or unreconstructed form, or to have its own expert test the state's criminalist's conclusions. Although we may consider the offer of proof in our inquiry, *we find no basis to conclude the criminalist's conclusions are reliable* and therefore determine they should be accorded little weight.

(Appendix A at 26–37, emphasis original in part, added in part; footnote omitted) Thus, the majority found the reconstruction of the tape unreliable for two reasons: (1) a perceived "inconsistency in the expert's testimony" (inability to match either end of the length of tape to the roll) and; (2) the fact that only one identifiable latent print was lifted from the wad of tape wrapped around the victim's hands. The first reason given by the majority is incorrect: the criminalist testified that the print was 21½ inches "from the end of the metal roll of tape." (Appendix H at 30) The second reason given the majority (only one identifiable print) is "silly." (Appendix B at 20).

The criminalist clearly testified that Carriger's print was 21½ inches from the end of the roll of tape:

> A. After I laid the segments of tape out, after separating them from the wad, I just started matching them together along irregular edges and fitting them in. On some of the junctions, I used either a magnifier or a microscope to have a closer look at the edges and a closer look at any of the contaminants that went across the tear and finally got the different segments laid out in the original order that they were before they were torn from each other.
>
> While I was doing this, I was able to fit the piece of tape containing the latent fingerprint in its appropriate place along the length of tape. After I did that and had it all laid out on the work bench, I measured the length that I had reassembled and then *I measured the distance from the roll of tape -- the ends of the roll, to the areas of the latent fingerprint match or the latent fingerprint segments*.
>
> . . .
>
> Q. Where is the segment in Exhibit 43, the latent lift segment of tape -- *where does that occur from the end of the metal roll of tape* contained in the plastic bag in Exhibit 41?.
>
> A. *Approximately 21 and a half inches*, ma'am.
>
> Q. To what degree of certainty are you certain of this result? Did I ask a bad question? Is there any degree of certainty that you can state that you are confident in your conclusion that you have reassembled the entire roll?.
>
> A. I am certain that I have reassembled the segment of tape that was torn to make the wad, and *I am certain that the latent fingerprint lift segment is in its appropriate place in relation to the length of tape and to the piece of tape on the ends of the roll of tape*.

(Appendix H, at 30 emphasis added) The majority was apparently confused by Carriger's cross-examination of the criminalist regarding where on the wad of tape the two segments that included the latent print had been located. (*Id.* at 33–34) The majority was clearly wrong in stating that the criminalist "could not match either end of the reconstructed tape to the end of the roll." (Appendix A at 26)[6].

The other reason given by the majority for finding the reconstruction unreliable—that only one of Carriger's prints was left on the wad of tape—is simply incredulous:

> The majority also relies on the fact that only one fingerprint was found on the tape: "Had Carriger left the print while binding the victim, as the sate contends, it is difficult to understand how he could have left only one print." Maj. op. at 14638. *This is silly*. We are not talking here about nine feet of tape laid out flat like an FBI fingerprint card. Most of the tape was stuck to itself and rolled up in a big wad, hardly the ideal medium for latent prints: "The development of fingerprints on adhesive tape has always been a challenge for latent fingerprint examiners." Advances in Fingerprint Technology 88 (Henry C. Lee & R.E. Gaensslen eds., 1994). *How many recoverable prints do my collegues expect to find on such an inhospitable surface*? I find it surprising that even a single readable print was retrieved from a wad of adhesive tape cut from the body of a murder victim.

(Appendix B at 20–21, emphasis added).

Thus, the majority was flat wrong in concluding that the reconstruction of the tape was not reliable, and in failing to consider this probative reliable evidence in conducting its *Schlup* "actual innocence" analysis. The evidence *had* to be considered. *Schlup*, 513 U.S. at 327–28. And, it establishes Carriger's guilt beyond *any* doubt.

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6. Moreover, *even if* the criminalist had been unable to determine which end of the tape matched up to the roll, Carriger's guilt is clearly established:

> If Carriger's print got on the tape before the murder, *it could only have been on the outside of the reel, which would place it on the first few inches used to tie Shaw's wrist.*
>
> . . .
>
> The majority points to a perceived inconsistency in the expert's testimony because the criminalist was unable to tell which end of the tape matched the end of the roll. It is difficult to understand why the majority sees this as inconsistent--*either way the fingerprint is not near the end.*

(Appendix B at 17, 18, emphasis added)

C. THE MAJORITY LOWERED THE SCHLUP "ACTUAL INNOCENCE" STANDARD.

In addition to utilizing unreliable repudiated recantation testimony to unlock the *Schlup* gateway and refusing to consider new reliable evidence which establishes Carriger's guilt, the majority "cuts the heart out of *Schlup*" (Appendix B at 8) by lowering the *Schlup* "actual innocence" standard to a "confidence in the outcome of the trial" standard. If allowed to stand, the majority holding will transform the "extraordinary" and extremely rare case envisioned by *Schlup* into the type of case often presented to federal courts on the eve of execution.

In *Schlup*, this Court made it clear that its adoption of the *Carrier* "actual innocence" standard required a habeas petitioner seeking federal review of otherwise abusive or procedurally barred claims "to show that he is 'actually innocent.'" 513 U.S. at 327 Indeed, it said so *several* times. *See Id.* at 324, 326, 327, 329. The Court explained how a district court was to determine whether a habeas petitioner had proven his "actual innocence":

> The meaning of actual innocence as formulated by *Sawyer* and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that *no reasonable juror would have found the defendant guilty*. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the *standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do*. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

513 U.S. at 329 (emphasis added).

Rather than acknowledge and apply the *Carrier* standard adopted by this Court in *Schlup*, the majority seizes upon part III of this Court's opinion in which the Court distinguished between an hypotesized *Herrera* "freestanding" "actual innocence" claim, and the type of "gateway" "actual innocence" claim raised in *Schlup*. (Appendix A at 34–36). *See Schlup*, 513 U.S. at 313–17. It is from this discussion that the majority pulls (then applies) the phrase "a court cannot have confidence in the outcome of the trial *unless* the Court is also satisfied that the trial was free of nonharmless error." (*Id.* at 35, quoting *Schlup*, 513 U.S. at 316, emphasis added by majority) The majority failed to acknowledge that the

Court went on to adopt the *Carrier* "actual innocence" standard which, while lower than the hypothesized *Herrera* standard, still *requires* the petitioner to prove "actual innocence," *not* merely demonstrate a lack of confidence in the verdict. *See Schlup*, 513 U.S. at 324-30. And, in criticizing the dissent for "incorrectly assum[ing]" that Carriger "must prove that he is actually innocent" the majority again quotes from that portion of this Court's opinion in *Schlup* distinguishing between a *Herrera*-type actual innocence claim and a *Schlup* gateway claim. (Appendix A at 36)

It is crystal clear that the majority significantly lowered the *Schlup* "actual innocence" standard to a "confidence in the outcome" standard:

> We do not agree . . . that our test under *Schlup* is to decide how a hypothetical jury would regard each bit of new evidence. *Our task is to determine whether confidence in the actual verdict is undermined. Schlup*, 115 S. Ct. at 861.

(Appendix A at 27 n. 4, emphasis added) Further, in finding that Carriger failed to meet the *Herrera* standard,[7] the majority effectively conceded that he could *not* meet the *Carrier/Schlup* standard:

> Although the postconviction evidence he presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, *not affirmatively to prove Carriger's innocence*. Carriger has presented no evidence, for example, demonstrating he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence, such as DNA, that would preclude any possibility of Carriger's guilt. Although Dunbar's confession

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7. The majority also erred in setting forth the *Herrera* "actual innocence" standard. It adopted and applied the "probably innocent" standard suggested by Justice Blackmun in his *dissent* in *Herrera*. (Appendix at 32) *See Herrera*, 506 U.S. at 442–44 (Blackman, J., dissenting) In *Herrera*, this Court assumed, for the sake of deciding the case before it, "that a *truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief*" if there were no state avenue open to process such a claim. 506 U.S. at 417 (emphasis added) It then said that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* In *Schlup* this Court stated that an *Herrera* claimant would have to "unquestionably" establish his innocence. 513 U.S. at 317. It is clear that, if a *Herrera* claim exists, it must be proven by far more than a mere preponderance—*at least* by "clear and convincing" evidence. *See Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997) (*Herrera* burden is "at least as exacting as the clear and convincing evidence standard")

What the majority has effectively done is lower the *Herrera* standard to the *Schlup* standard and, in turn, lower the *Schlup* standard to the *Strickland* standard.

> exonerating Carriger does constitute some evidence tending affirmatively to show Carriger's innocence, we cannot completely ignore the contradictions in Dunbar's stories and his history of lying. Accordingly, the confession by itself *falls short of affirmatively showing that Carriger more likely than not is innocent*.

(*Id.* at 33–34, emphasis added) And, in finding that Carriger had met the *Schlup* standard, it stated:

> Although *Carriger has not affirmatively proved his actual innocence* sufficiently to satisfy *Herrera*, we believe he has more than shown *sufficient doubt about the validity of his conviction* to satisfy *Schlup* and permit consideration of his constitutional claims.

(*Id.* at 36, emphasis added).

As noted by the dissent, "The majority seems to adopt the *Strickland* prejudice standard rather than the *Schlup/Carrier* for Ninth Circuit actual innocence claims." (Appendix B at 9, n. 7) This Court must see to it that the Ninth Circuit applies "what *Schlup* demands." (*Id.* at 9).

D. CARRIGER'S "ACTUAL INNOCENCE" CLAIM IS NOT LINKED TO A CONSTITUTIONAL ERROR.

Finally, aside from the aforementioned errors, the majority went on to review a constitutional claim unattached to the claim of actual innocence.[8] This appears to be contrary to the dictates of *Schlup* and *Carrier*.

In *Schlup* this Court adopted the *Carrier* actual standard, stating that "[t]he *Carrier* standard requires to show that '*a constitutional violation* has probably resulted in the conviction of one who is actually innocent.'" 513 U.S. at 327 (emphasis added), quoting *Carrier*, 477 U.S. at 496. It also said:

> We conclude that *Carrier*, rather than *Sawyer*, properly strikes that balance when the claimed injustice is that *constitutional error has resulted in the conviction of one who is actually innocent* of the crime.
>
> . . . [E]xperience has taught us that a substantial claim that *constitutional error has caused* the conviction of an innocent person is exceedingly rare.

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8. As previously noted, the *Brady* claim related to the State's failure to obtain, review, and hand over to the defense Dunbar's DOC file.

Id. at 324 (emphasis added) And, the Court cited to and quoted from *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) in discussing the "fundamental miscarriage of justice" gateway to otherwise barred federal claims. *Id.* 314-14. In *McCleskey* (as in *Carrier*) this Court required that the "actual innocence" claim be linked to the alleged constitutional error. 499 U.S. at 502 ("McCleskey cannot demonstrate that the alleged *Massiah* violation *caused the conviction* of an innocent person" (emphasis added)) In adopting the *Carrier* standard, the Court did not state that it was deleting the requirement that the showing of actual innocence be linked to the underlying constitutional claims.[9] *See O'Dell v. Netherland*, 95 F.3d 1214, 1246 n. 26 (4th Cir. 1996) (noting that in *Schlup* this Court did not appear to abandon the "but for" requirements of *Carrier* and *McCleskey*)

In the present case, Dunbar's recantation is not at all tied to the *Brady* claim addressed by the majority, or *any* other federal constitutional claim. Rather, it is a "freestanding" claim. Thus, putting aside all of its other misapplications of *Schlup*, the majority erred in unlocking and passing through the *Schlup* gateway and reviewing a constitutional claim unattached to the "actual innocence"claim.[10]

III

THE EN BANC COURT'S HOLDING THAT A PROSECUTOR MUST OBTAIN, REVIEW, AND PROVIDE TO THE DEFENSE, INFORMATION OF WHICH THE DEFENSE HAS ACTUAL KNOWLEDGE IS INCONSISTENT WITH *BRADY* AND ITS PROGENY AND CONFLICTS WITH THE LAW OF THE OTHER FEDERAL CIRCUIT COURTS.

After passing through the *Schlup* gateway, the en banc majority held that the State of Arizona committed a *Brady* violation by failing to obtain, review, and hand over to the defense Robert Dunbar's DOC file. The majority acknowledged that the prosecution may not have been aware of the file (Appendix A at 39) and that Carriger and his trial counsel *knew* of the existence of Dunbar's DOC file. (*Id.* at 10) The majority's holding is

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9. In *Schlup*, the petitioner's constitutional claims were linked to his claim of actual innocence; he claimed that his trial counsel was ineffective in "failing to interview and to call witnesses who could establish Schlup's innocence," and that the State committed a *Brady* violation by not disclosing the witnesses. 513 U.S. at 306, 307, 314.

10. In the event the Court intended to abandon the "but for" requirement in *Schlup* it should expressly say so to provide guidance to federal courts reviewing *Schlup* claims. *See O'Dell*, 95 F.3 d at 1246 n.26

inconsistent with this Court's holding in *Brady* and its progeny, and conflicts with the law of the other federal circuits.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *Giglio v. United States*, 405 U.S. 150, 153–55 (1972), the Court held that *Brady* applied to impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) In *Bagley*, the Court reaffirmed that impeachment evidence as well as exculpatory evidence fell within *Brady* material, 473 U.S. at 676–77, and announced that the *Strickland* prejudice analysis applied, regardless of whether the defendant requested disclosure. 473 U.S. at 682. Finally, in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 1567 (1995), the Court placed upon the prosecution the following burden regarding "undisclosed" evidence: "the individual prosecutor has a duty to learn of any favorable evidence known to the others *acting on the government's behalf in the case, including the police*." (emphasis added)

This Court has *never* held that the prosecution has an obligation to seek out from government agencies, not involved in the investigation or prosecution, possible impeachment evidence *known to the defense* (but *not* the prosecution), place it on a silver platter, and present it to the defense. *See United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) ("neither *Kyles* nor [*United States ex rel. Smith v.*] *Fairmain* [769 F.2d 386 (7th Cir. (1995)] can be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue") That is precisely what the Ninth Circuit has held is required by *Brady* and *Kyles*. (Appendix A at 38–40)

This case was prosecuted by the Pima County Attorney's Office (based upon a conflict in the Maricopa County Attorney's Office) and investigated by the City of Phoenix Police Department. The majority acknowledged that the record did not indicate that the prosecutors involved in the case "ever actually possessed Dunbar's corrections file." (Appendix A at 39) Nor did the Phoenix police. The Arizona Department of Corrections—a *state* agency—is independent of both the County Attorney's Office and the Phoenix Police Department, and was *not* at all involved in the investigation or prosecution of this case. However, as acknowledged by the majority, both Carriger and his counsel *knew* of the existence of Dunbar's DOC file:

> Carriger's principal postconviction claim was that his trial counsel had been ineffective for failing to investigate Dunbar adequately and for *failing to obtain Dunbar's Department of Corrections file, despite a request from Carriger that he do so.*

(*Id.* at 10, emphasis added) And, based upon the following excerpts of Carriger's letter to trial counsel, it is clear that that defense knew of the type of material that could be found in Dunbar's DOC file, as well as the fact that Dunbar had been an informant:

> Point #3
> Bobby Dunbar was the informant for the state against John Douglas Troutman for a safe burglary of the National Cash Register Company (about 1968 I think)
>
> . . .
>
> Point #4
> Perhaps *while we are getting Dunbar's prison record* we should also get a copy of mine.

(Appendix B at 22, emphasis added by Judge Kozinski) As pointed out by the dissent: "A prosecutor has no duty to investigate and turn over impeachment evidence the defense already knows about." (*Id.* at 23)

The other federal circuits uniformly agree: *Brady* is not violated if the defense has knowledge of the existence of potentially exculpatory evidence or impeachment material and simply fails to obtain it. *Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir. 1997); *United States v. Flores-Mireles*, 112 F.3d 337, 340 (8th Cir. 1997); *United States v. Zagari*, 111 F.3d 307, 320 (2nd Cir. 1997); *Morris*, 80 F.3d at 1170 (7th Cir.); *Routly v. Singletary*, 33 F.3d 1279, 1285 (11th Cir. 1994); *United States v. Clark* 928 F.2d 733, 738 (6th Cir. 1991); *United States v. Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980); *Hampton v. United States*, 504 F.2d 600, 603 (10th Cir. 1974) Indeed, most circuits hold that *Brady* is not violated if the defense could have obtained the information from sources external to the prosecution through the exercise of reasonable "diligence." *Rector*, 120 F.3d at 558–59 (5th Cir.); *Flores-Mireles*, 112 F.3d at 340 (8th Cir.); *Zagari*, 111 F.3d at 320 (2nd Cir.); *Morris*, 80 F. 3d at 1170 (7th Cir.); *Routly*, 33 F.3d at 1285 (11th Cir.); *Clark*, 928 F.3d at 738 (6th Cir.).

The "silver platter doctrine" fashioned by the en banc majority is out of line with this Court's *Brady* caselaw and conflicts with every other federal circuit to address the issue. And, it places an untenable burden on the prosecution to locate and scour through the records of every conceivable government agency unconnected to the investigation or

prosecution of the case in search of potential impeachment evidence, then present it to the defense—even if the defense is aware of the existence of the material but simply fails to, or chooses not to, obtain the material. For now, however, that is the law of the Ninth Circuit. This Court must grant certiorari to correct this perversion of *Brady*.

CONCLUSION

The en banc majority has clearly erred in refusing to grant deference to a state court's credibility determination, in its interpretation and application of this Court's decision in *Schlup*, and in finding a *Brady* violation where the defense had actual knowledge of the documents containing the impeachment material. The decision is contrary to this Court's caselaw and conflicts with virtually every other federal circuit court of appeals on all three issues. If allowed to stand, the decision will create chaos throughout federal courts within the Ninth Circuit, and will likely adversely influence federal courts nationwide.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JOSEPH T. MAZIARZ
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONER

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